

FEDERAL CIRCUIT COURT OF AUSTRALIA

Le v Minister for Immigration and Border Protection [2021] FCCA 1447

File number(s): MLG 2552 of 2016

Judgment of: **JUDGE RIETHMULLER**

Date of judgment: 28 June 2021

Catchwords: **MIGRATION** – judicial review – partner visa application – genuine spousal relationship – grounds for review – criminal history – no matters of principle – application dismissed

Legislation: *Migration Act 1958* (Cth) ss 5F, 66, 347
Migration Regulations 1994 (Cth) rr. 1.15A(3), 4.10 and cl. 801.221

Cases cited: *Basra v Minister for Immigration and Border Protection* [2018] FCA 422;
CNY17 v Minister for Immigration and Border Protection [2019] HCA 50
DFQ17 v Minister for Immigration [2019] FCAFC 64
Ebner v Official Trustee in Bankruptcy [2000] HCA 63
Migration Act 1958 (Cth)
Minister for Immigration and Border Protection v Angkawijaya [2016] FCAFC 5
Minister for Immigration and Multicultural and Multicultural Affairs v Jia Legeng [2001] HCA 17
Minister for Immigration, Local Government and Ethnic Affairs v Gamdur Singh Dhillon and Marcelle Suzanne Maree Lievense Dhillon [1990] FCA 144
Minister for Immigration, Local Government and Ethnic Affairs v Dhillon [1990] FCA 200
MZAPC v Minister for Immigration and Border Protection [2021] HCA 17
Stanford v Stanford [2012] HCA 52
SZOFÉ v Minister for Immigration and Citizenship [2010] FCAFC 79
Waensila v MIBP [2016] FCAFC 32

Number of paragraphs: 68

Date of last submissions: 17 March 2021

Date of hearing: 17 March 2021

Place: Melbourne (via Microsoft Teams)

Solicitor for the Applicant: Erskine Rodan & Associates

Counsel for the Applicant: Mr McBeth

Solicitor for the Respondents: Clayton Utz

Counsel for the Respondents: Mr Hibbard

ORDERS

MLG 2552 of 2016

BETWEEN: **THI LAN HUONG LE**
 Applicant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: JUDGE RIETHMULLER

DATE OF ORDER: 28 JUNE 2021

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The parties be granted 7 days to file written submissions with respect to costs sought.

REASONS FOR JUDGMENT

JUDGE RIETHMULLER:

- 1 The applicant seeks judicial review of a decision of the Administrative Appeals Tribunal ('the Tribunal') affirming a decision of a delegate of the Minister to refuse to grant the applicant a Partner (Temporary) (Class UK) (Subclass 820) visa ('partner visa').
- 2 The key issue before the Tribunal was whether the applicant and the sponsor were in a genuine spousal relationship at the time of the visa application, and at the time of the decision by the Tribunal.

BACKGROUND

- 3 The applicant was born in Vietnam and came to Australia on a visitor visa in 2009. The applicant met her future husband, her partner visa sponsor, Mr Q, in May 2010, after which they commenced a relationship.
- 4 In or around March 2012, the applicant was charged in Australia with cultivating cannabis and was remanded in the Dame Phyllis Frost Centre. On 7 November 2012, the applicant was sentenced to 230 days imprisonment and was subsequently detained at Maribyrnong Immigration Detention Centre.
- 5 On 9 December 2012, the applicant married Mr Q while she was in detention at the Maribyrnong Immigration Detention Centre. On 21 December 2012, the applicant was released from the Maribyrnong Immigration Detention Centre on a bridging visa, and she commenced living with Mr Q.
- 6 On 28 December 2012, the applicant applied for a Partner (Temporary) (Class UK) (Subclass 820 visa), sponsored by Mr Q. The applicant also applied for a Partner (Permanent) (Class BS) (Subclass 801) visa. On 14 February 2014, the delegate refused to grant the visas.
- 7 On 23 April 2015, the Tribunal confirmed the delegate's decision to refuse the visa application. The applicant applied to this court and the matter was remitted to the Tribunal for reconsideration on 6 April 2016, based on circumstances similar to those discussed in the decision of *Waensila v MIBP* [2016] FCAFC 32.

8 On 17 August 2016, the applicant appeared before the Tribunal and was represented by a registered migration agent. The Tribunal also heard oral evidence from Mr Q, the applicant's sponsor, and several other witnesses: see paragraph [7] of the Tribunal's decision.

9 On 25 October 2016, the Tribunal again affirmed the decision of the delegate.

Applicant Case

10 The Tribunal recounted the history of the applicant's relationship with her sponsor as follows:

15. According to the applicant's written submissions made in support of the review, she first met her sponsor Tuan Hoa Quan at a Buddhist temple in St Albans in May 2010. As a devout Buddhist the applicant, who was living in Lilydale at the time, travelled to Melbourne each weekend to visit the temple where she regularly volunteered. The sponsor also regularly attended the temple and volunteered there. After a chance meeting at a Chinese restaurant in St Albans, not long after their first meeting at the temple, the sponsor asked the applicant out on a dinner date at 'All You Can Eat' restaurant in Sunshine. They then commenced seeing one another regularly. According to the applicant's submissions, not long after that she started to stay at the sponsor's place in Richmond on the weekends, and this arrangement continued until she was arrested by the police in March 2012 and jailed for drug offences.
16. With reference to the decision of the first Tribunal (differently constituted) which found that the couple had only been in a married relationship for three weeks at the time of the visa application in December 2012, the applicant has submitted that they could not live together before marriage due to their religious beliefs. Because both parties come from devout Buddhist families and communities that strongly believe that unmarried couples should not cohabit and have sexual relationship before marriage, during the initial stages of their relationship the applicant only stayed with the sponsor on weekends. When the applicant moved to Melbourne from Lilydale (shortly before her arrest in March 2012) they continued to maintain separate residences due to the social stigma associated with unmarried couples living together. Despite their open-mindedness, many people did not know that the parties were living together for several days a week, as they did not inform many people of their living arrangements for religious and cultural reasons. Had their living arrangements been known to others, the applicant would have been ostracised and shamed by her family and her community.
17. The applicant's submission is that the couple always intended to live together once they were married, and have maintained throughout the visa application process that they were in a de facto relationship despite their then living arrangements. She has submitted that they maintained separate living arrangements until she was released from Maribyrnong Immigration Detention Centre after the couple married, and after which she started living the sponsor on a full-time basis as she was already married to him by then.

Tribunal Findings

11 The Tribunal accepted that when the applicant was released from detention on 21 December 2012, she lived with the sponsor. However, the Tribunal also found that:

- 72 ...the parties' evidence about their living arrangements between mid-2010 and the time of the visa application to be implausible.
- 73. Taking into account their evidence as a whole about the nature and duration of their relationship, the Tribunal finds that neither the applicant nor the sponsor could provide a coherent explanation as to why the applicant relocated from Lilydale to St Albans in order to be closer to both her temple and to the sponsor, rather than staying with the sponsor, which she claims was already doing at that time, on two or three nights of the week. The applicant's evidence about this matter was inconsistent. Her written submissions state that the applicant's rent at the house in St Albans was to be \$300.00 a month for a room at the four bedroom house (Tribunal file 1403657, f.144) but she repeatedly told the Tribunal that a reason for her moving there was because it was free accommodation. The Tribunal has also considered the sponsor's evidence that the Department of Human Services Housing Office would not have permitted the applicant to live with him without registration, but he has not identified any obstacle which might have existed to securing that registration, which they subsequently have obtained.
- 74. There is minimal evidence before the Tribunal regarding the financial aspects of the parties' relationship or the nature of any household they shared at the time of the visa application. The Tribunal gives significant weight to the inconsistencies in the parties' evidence about whether or not the visa applicant met and acknowledged the sponsor's daughter when the sponsor and his daughter lived together in Richmond and when the parties claim to have been in a de facto relationship prior to their marriage. The Tribunal has considered the applicant's suggestion that this inconsistency can be explained by the difference between the term 'child' and the term 'daughter' but does not accept that this is plausible. Even if the evidence in this respect was not inconsistent the Tribunal considers that had the applicant been living with the sponsor for two or three days a week at a home he shared with his daughter, she would have been able to tell the Tribunal something about the applicant's daughter.
- 75. The Tribunal also affords some adverse weight to the parties' evidence that that the visa applicant had not met the sponsor's son and the sponsor had not had any contact with the applicant's children at the time of application, matters which they could not explain. The Tribunal considers that it would be expected that a couple in a genuine and committed spousal relationship would have some contact with, or have met one another's children, or be able to explain why they have not.
- 76. The Tribunal further does not accept as plausible the parties' evidence regarding the sponsor's father. The sponsor's evidence is that he was the full time carer of his father who required ongoing daily care including dialysis prior to his death in June 2013. Both the applicant and the sponsor claim that they were in a de facto partner relationship from mid-2010 until they married in December 2012 and were in a married relationship at the time of application. However in the course of their relationship the applicant only met the sponsor's father once, in 2011. The Tribunal does not accept that it is

plausible the sponsor was providing full time care to his father including weekends and also maintaining a de-facto relationship with the visa applicant, but that the visa applicant only ever encountered his father once, approximately two years before his death. The Tribunal has considered the applicant's evidence that the sponsor's father did not like having visitors, but does not consider that this overcomes the Tribunal's concerns about the plausibility of these arrangements.

12 The Tribunal noted at paragraph [77] of the decision, that based on the evidence as a whole, it gave limited consideration to the witness statements.

13 The Tribunal did not accept the applicant's evidence regarding why she did not contact the sponsor for seven and a half months following her arrest, saying:

78. Although the Tribunal accepts that the arrest and criminal charges may have been matters of shame and loss of face for the applicant, the Tribunal does not accept that these concerns would have prevented her from contacting her claimed de facto partner of almost two years standing and with whom she claimed to be living for part of each week, to tell him what had happened to her.

14 Overall, the Tribunal did not find that the applicant to be a credible witness:

80. Consideration of her overall circumstances suggests that she is willing to go to significant lengths to maintain her residence in Australia. Specifically the Tribunal considers that her actions in making contact with the sponsor at the end of a lengthy period of detention, and shortly before she was to depart Australia, suggest that she was motivated by a desire to secure residence in Australia rather than by her commitment to the sponsor.

15 The Tribunal determined at paragraph [70] of the decision that:

...while the applicant and sponsor were legally married on 9 December 2012 and the applicant applied for the visa on 28 December 2012 they did not at that time demonstrate a mutual commitment to a shared life as husband and wife to the exclusion of all others, nor does the Tribunal accept that the relationship between them at the time of the visa application was genuine and continuing.

16 The Tribunal referred to the test in the *Minister for Immigration, Local Government and Ethnic Affairs v Gamdur Singh Dhillon and Marcelle Suzanne Maree Lievense Dhillon* [1990] FCA 144 (Northrop, Wilcox and French JJ) at paragraph [81] of the decision:

In so finding the Tribunal has considered and acknowledges that people enter into marriages with a variety of purposes and motives, and that it is not necessarily inconsistent with a genuine marriage relationship that it is entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country (*Minister for Immigration, Local Government and Ethnic Affairs v Dhillon* (Northrop, Wilcox and French JJ, 8 May 1990, unreported). As the Court held in *Dhillon*;

“The true test, we would suggest the only test, is whether at the time at which the matter has to be decided it can be said that the parties have a mutual

commitment to a shared life as husband and wife to the exclusion of others.”

17 The Tribunal was not satisfied that the parties shared the requisite mutual commitment at the time of the visa application:

82. ...it is not satisfied that the visa applicant had the requisite commitment to her sponsor at the time of the visa application.

...

84. The Tribunal has considered the parties' claim that they have been living together for more than three and a half years since the applicant was released from detention and that during that period she has cared for the visa applicant. The Tribunal has taken into account the findings of the Court in *Bretag v RT* (1991) FCA 582 which is authority for the proposition that the Tribunal may take into account circumstances that occur after the time of application in assessing the circumstances that existed at that earlier time point in time. The Tribunal has considered whether the events subsequent to the time of the visa application tend logically to show that the parties were in a spousal relationship at the time of the visa application. However based on the evidence before it considered as a whole, and in light of the Tribunal's concerns about the credibility of the visa applicant, the Tribunal does not accept that the parties' circumstances since the time of the visa application indicate that they were in a genuine spousal relationship at the time of application in December 2012.

GROUND FOR JUDICIAL REVIEW

18 The applicant's further Amended Application filed on 18 February 2021 sets out five grounds for review to consider.

Ground One

19 The first ground is framed in simple terms as:

1. The Tribunal lacked jurisdiction on the ground that the notification of the delegate's decision was invalid.

20 The applicant argues that the method of notification of the delegate's decision did not comply with s. 66 of the *Migration Act 1958* (Cth) ('the Act'). Thus, the applicant argues that the Tribunal did not have jurisdiction, as the application to the Tribunal was lodged prior to a valid notification of the delegate's decision. The applicant relies upon the statement in *DFQ17 v Minister for Immigration* [2019] FCAFC 64 at paragraph [62], where Perram J said:

I have no doubt that in this case the letter of 3 February 2017 failed to convey clearly the information that any review application had to be made by 13 March 2017. It was piecemeal, entirely obscure and essentially incomprehensible. Consequently, the letter did not state the matter in s 66(2)(d)(ii). It was not in dispute that this meant that time had not yet commenced to run. The Tribunal erred in concluding that the

review application was out of time and was therefore wrong in thinking it had no jurisdiction to entertain the review application.

21 Section 347(1)(b) of the Act sets the time for an application to the Tribunal, using the phrase ‘within the prescribed period, being a period ending’. Regulation 4.10(1)(a) of the *Migration Regulations 1994* (Cth) (‘Regulations’) prescribes the method for calculating the time period as follows:

4.10 Time for lodgement of applications with Tribunal (Act, s 347)

(1) For paragraph 347(1) of the Act, the period in which an application for review of a Part 5-reviewable decision must be given to the Tribunal:

(a) if the Part 5- reviewable decision is mentioned in subsection 338(2) or (7A) of the Act- starts when the applicant receives notice of the decision and ends at the end of 21 days after the day on which the notice is received;

22 The question of whether a Tribunal’s jurisdiction only commences after a valid notice is provided, was addressed by the Full Court of the Federal Court of Australia (‘Full Court’) in *SZOFÉ v Minister for Immigration and Citizenship* [2010] FCAFC 79 with respect to similar provisions. The Full Court concluded that an application to the Tribunal before a valid notice is sent, is nonetheless a valid application. The applicant says that this case can be distinguished as the notification was sufficient in practice in that case.

23 Considerable argument was addressed to the claim that the applicant had applied for two visas: a Partner (Temporary) Visa and a Partner (Residence) Visa. The two visas have different subclass numbers (820 and 801 respectively). Both classes of visa have substantially the same criteria, however, an applicant must first hold a Partner (Temporary) visa in order to obtain a Partner (Residence) visa: see cl. 801.221(2)(a) of the Regulations. On a practical level, both visas are sought, and the Partner (Temporary) visa issued first.

24 The applicant argues that the notification from the delegate of the Minister (which related to both visa applications) was defective and that the application to the Tribunal was on a form that referred to subclass 801 (the Spouse (Residence) visa) and not to the relevant visa, the Spouse (Temporary) visa under subclass 820. However, all parties and the Tribunal proceeded upon the basis that the application was with respect to the 820 refusal. There would have been no point considering the refusal of the 801 visa, as a necessary prerequisite for the 801 visa is the grant of the 820 visa.

25 It is clear that the decision of the delegate of the Minister is to be treated as two decisions, as explained in *Basra v Minister for Immigration and Border Protection* [2018] FCA 422:

36. A convenient starting place is the question whether the first delegate's decision is to be treated, for present purposes, as the making of two decisions or only one decision. I do not think this question can be answered without reference to the statutory scheme. As set out in the Reasons, the statutory scheme relevantly established two different visas (namely, the Subclass 820 visa and the Subclass 801 visa), with separate criteria applicable for each visa. Given this statutory scheme, I consider that the first delegate's decision should be treated as two decisions, one in respect of each visa. It may be accepted that there was a close relationship between the two decisions. In particular, they were expressed in the one instrument and singular language ("decision") was used in the decision record. Nevertheless, in circumstances where the statutory scheme established two different visas, each with their own criteria, the first delegate's decision to reject the appellant's application should be treated as two decisions.

37. Once it is accepted that the first delegate's decision should be treated as two decisions, it follows that it is conceptually possible for one of the decisions to be affected by jurisdictional error, and the other to have been validly made. Thus, at least on one view, the first delegate's decision in relation to the Subclass 801 visa was affected by jurisdictional error (on the basis that the first delegate failed to consider the applicable criteria for that visa) and the decision in relation to the Subclass 820 visa was validly made. (It may be noted that, in circumstances where the Subclass 801 visa criteria included the holding of a Subclass 820 visa, the decision to refuse the Subclass 820 visa would seem inevitably to lead to the conclusion that the application for a Subclass 801 visa would be refused.) In these circumstances, consistently with *Bhardwaj*, it was open to the Minister to treat the decision of the first delegate in relation to the Subclass 801 visa as, in law, "no decision at all" (*Bhardwaj* at [51]-[53]) and to 'remake' that decision. Adopting the language of *Bhardwaj*, the duty to make a decision on the appellant's application for a Subclass 801 visa remained unperformed. It was performed when the second delegate made a decision to refuse the application for that visa.

26 However, when one categorises the nature of the delegate's decision and the subsequent review rights, it does not appear to be material to the applicant's case before me. The applicant has only sought to review the 820 visa decision (which is the only decision that can lead to a different outcome). Regardless of what may have been printed on the form, it is clear that the applicant intended to review the 820 decision and the Tribunal proceed to hear and determine the review on that basis.

27 It does not appear that the Tribunal lacks jurisdiction until the requisite time passes after a notification is sent in accordance with s. 66 of the Act. The Tribunal's jurisdiction commences upon the making of the delegate's decision. The effect of the sections with respect to time limits is that the time limit does not start to run until such a notice is sent. In these circumstances, it is unnecessary to consider the various arguments about the notices in

this case, as the Tribunal accepted the review application and heard and determined the review. To proceed otherwise would require a finding that the applicant had not made a valid review application, which would leave the delegate's decision in place, and this is not the outcome sought by the applicant.

28 As a result I dismiss this ground.

Ground Two

29 The second ground addresses the test that the Tribunal used to determine whether the relationship between the applicant and sponsor was within the definition for this visa category. Ground 2 is framed as follows:

In determining whether the applicant was in a married relationship, the Tribunal applied the wrong legal test.

Particulars

- a. The Tribunal erred in assuming that romantic love and affection are necessary components of a married relationship.
- b. The Tribunal erred in finding that the applicant did not have "a reciprocal commitment" to the relationship and that she and the sponsor were therefore not in a married relationship.

30 The relevant test for this ground is set out in s. 5F of the Act:

5F Spouse

- (1) For the purposes of this Act, a person is the spouse of another person (whether of the same sex or a different sex) if, under subsection (2), the 2 persons are in a married relationship.
- (2) For the purposes of subsection (1), persons are in a married relationship if:
 - (a) they are married to each other under a marriage that is valid for the purposes of this Act; and
 - (b) they have a mutual commitment to a shared life as a husband and wife to the exclusion of all others; and
 - (c) the relationship between them is genuine and continuing; and
 - (d) they:
 - (i) live together; or
 - (ii) do not live separately and apart on a permanent basis.

31 Relevant considerations for this section are set out in r. 1.15A(3) of the Regulations, which provides for matters that must be taken into account as follows:

1.15A Spouse

(3) The matters for subregulation (2) are:

(a) the financial aspects of the relationship, including:

- (i) any joint ownership of real estate or other major assets; and
- (ii) any joint liabilities; and
- (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
- (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
- (v) the basis of any sharing of day-to-day household expenses; and

(b) the nature of the household, including:

- (i) any joint responsibility for the care and support of children; and
- (ii) the living arrangements of the persons; and
- (iii) any sharing of the responsibility for housework; and

(c) the social aspects of the relationship, including:

- (i) whether the persons represent themselves to other people as being married to each other; and
- (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
- (iii) any basis on which the persons plan and undertake joint social activities; and

(d) the nature of the persons' commitment to each other, including:

- (i) the duration of the relationship; and
- (ii) the length of time during which the persons have lived together; and
- (iii) the degree of companionship and emotional support that the persons draw from each other; and
- (iv) whether the persons see the relationship as a long-term one.

32 The applicant points to the case *Minister for Immigration, Local Government and Ethnic Affairs v Dhillon* [1990] FCA 200, where the Court said:

11. It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country. The true test, we would suggest the only test, is whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others.

33 The applicant also relies upon *Minister for Immigration and Border Protection v Angkawijaya* [2016] FCAFC 5 (*'Angkawijaya'*) where the court said that:

52. ... There is no basis in the legislative scheme to conclude that those circumstances do not include a consideration of whether or not there is love and affection in a claimed de facto relationship. In a particular case, for example, the evidence may suggest that the love and affection between the couple is very strong; that would be relevant to the genuineness and continuing nature of the relationship, as well as to the question of there being a mutual commitment to a shared life.

53. ... because the existence of love and affection is not determinative of the question whether there exists a de facto relationship at the relevant time, its absence is not necessarily fatal to the Minister's favourable consideration of a partner visa application,

34 On the facts in *Angkawijaya*, the Tribunal did not refer to 'love and affection', however, the court took the view that it considered this issue determinative, saying:

60. Not only is it clear that the Tribunal took into account its findings regarding the "ambivalence" and "detachment" in Ms Angkawijaya's relationship with Mr Limberiou, it also took into account its findings concerning Mr Limberiou's feelings towards Ms Angkawijaya on this issue. This is most apparent in [105] of the Tribunal's reasons for decision where, after noting Mr Limberiou's evidence that "he is happy and they are compatible in every way because they do not fight and they have been together for a long time", the Tribunal stated that it remained concerned about "his level of commitment to Mrs Angkawijaya and whether Mr Limberiou views their relationship as a shared life together". The Tribunal considered that Mr Limberiou's inability to pronounce and spell Ms Angkawijaya's surname reflected "a level of indifference" in regard to Mr Limberiou's relationship with Ms Angkawijaya. When the Tribunal then referred to Mr Limberiou's apparent interest being to have "someone being with him rather than being committed to a relationship ... and to a shared life together", the Tribunal was clearly referring to what it considered to be an absence of evidence from him that he had feelings of romantic love towards Ms Angkawijaya.

...

66. ... The primary judge was correct to view the Tribunal's reasons as revealing that its consideration of the issue of love and affection in the relationship was not simply a product of the particular evidence before it but rather stemmed from the Tribunal's erroneous belief that the relevant legislative provisions made this a fundamental if not determinative issue.

35 The applicant points to the Tribunal's reasons in the present case, where the Tribunal says:

80. As noted above, and for the reasons given, the Tribunal did not find the applicant to be a credible witness. A consideration of her overall circumstances suggests that she is willing to go to significant lengths to maintain her residence in Australia. Specifically the Tribunal considers that her actions in making contact with the sponsor at the end of a lengthy period of detention, and shortly before she was to depart Australia, suggest that she was motivated by a desire to secure residence in Australia rather than by her

commitment to the sponsor.

81. In so finding the Tribunal has considered and acknowledges that people enter into marriages with a variety of purposes and motives, and that it is not necessarily inconsistent with a genuine marriage relationship that it is entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country (*Minister for Immigration, Local Government and Ethnic Affairs v Dhillon* (Northrop, Wilcox and French JJ, 8 May 1990, unreported). As the Court held in *Dhillon*;

“The true test, we would suggest the only test, is whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others.”

82. However based on the evidence before it the Tribunal is not satisfied that at the time of the visa application the parties shared a mutual commitment to a shared life as husband and wife to the exclusion of all others, because it is not satisfied that the visa applicant had the requisite commitment to her sponsor at the time of the visa application. In so finding the Tribunal acknowledges that the level of commitment to the marriage does not need to be of equal strength between the parties, but considers that a reciprocal commitment, at some level is required.
83. The Tribunal has considerable sympathy for the sponsor in this case, and accepts that he genuinely loves the applicant and is highly reliant upon her for his day to day care. However this does not overcome the Tribunal's view that he and the applicant did not have the requisite commitment of the kind described in s.5F(2)(b) at the time of the visa application.

36 It is apparent that the Tribunal took into account that the sponsor loves the applicant and is reliant upon her. However, the Tribunal Member was not satisfied that the applicant had a ‘commitment to a shared life as a husband and wife to the exclusion of all others’. In order to understand the reasons for this finding, it is necessary to consider all of the paragraphs from [62] to [81] of the decision, where the Tribunal discusses these matters under the heading, ‘The nature of the parties’ commitment to one another’. The matters discussed in these 19 paragraphs traverse much evidence about the nature of the relationship and make adverse findings about the applicant’s credibility. When read in context, it does not appear that the Tribunal was considering the concept of ‘commitment’ as one solely related to love and affection. It was not impermissible for the Tribunal to rely upon the sponsor’s love of the applicant as part of the factual matrix relevant to his commitment to the relationship. However, this does not mean that the Tribunal’s findings with respect to the respondent were based simply upon a lack of ‘love and affection’. For example, the Tribunal took account of the following:

- (1) The applicant's decision not to tell the sponsor of her arrest and detention on drug charges, despite saying they were in a de facto relationship at the time, leading to no contact with him for a period of seven and a half months in 2012;
- (2) The applicant's claim that she 'didn't think anything' when in detention, simply passing her time in prayer, despite the claimed commitment to the sponsor and his dependence upon her;
- (3) The circumstances of the cohabitation of the applicant and sponsor since her release from the detention centre;
- (4) The health difficulties that the sponsor has and the difficulties if the applicant had to leave Australia;
- (5) Why they chose to delay telling friends of their relationship and the reasons they did not marry earlier;
- (6) The lack of contact between the applicant and the sponsor with their respective children before the time of application;
- (7) That the applicant only met the sponsor's father once in 2011, despite the sponsor being his father's full time carer until his father's death in 2013;
- (8) Signing a voluntary removal request and then recontacting and marrying the sponsor shortly thereafter; and
- (9) Noting that the applicant had lived with the sponsor for four years following her release from detention.

37 Counsel for the Minister identifies other relevant matters in their submissions saying:

32. This conclusion was influenced by numerous factors, including (without limitation) that: (a) there was very little evidence that the parties had shared financial arrangements at the time of the visa application ([25], see also [74]); (b) the parties had lived together on a full time basis for only one week at the time of the visa application ([26]), and their evidence about their previous living arrangements was implausible ([72]); (c) the parties' evidence about the social aspect of their relationship at the time of the visa application was "scant and unpersuasive" ([49], see also [52]), and that their purported reasons for why they did not represent themselves socially as a couple at this time were unpersuasive ([60]).

38 Whilst the absence of romantic love or affection cannot be determinative of the question, the presence of such love or affection is likely to be a relevant factor in favour of a finding that the relationship has been established.

- 39 I do not draw the inference that a reference to the sponsor's love of the applicant indicates that the Tribunal treated 'love and affection' as a necessary element in the definition, rather than one of the many factors the Tribunal had to consider in making its findings.
- 40 Whilst the Tribunal used the word 'reciprocal' rather than 'mutual', it does not appear to me that anything turns on the difference in words in the context of this decision: indeed, it may well indicate a lower standard of affection, in that the word 'mutual' indicates that each loves the other unconditionally, whereas 'reciprocity' may indicate that the love or affection is conditional upon a similar love or affection being given in return.
- 41 Ultimately, it was not irrelevant to take account of the nature of the applicant and sponsor's love or affection for each other, even though love and affection is not an essential element of the relationship. The same can be said with respect to cohabitation: whilst ordinarily a strong indicator of a relationship, there are cases where the absence of cohabitation is not determinative of the question: see, for example, the facts in the High Court's decision in *Stanford v Stanford* [2012] HCA 52.
- 42 In any event, the Tribunal Member specifically notes the different reasons for which parties enter into relationships: see paragraph [81] of the decision (as quoted above).
- 43 When considering the reasons as a whole, I am not persuaded that the Tribunal Member fell into error as alleged in this ground. I therefore find that the applicant has not established this ground.

Ground Three

- 44 The third ground is framed as follows:

The Tribunal applied the incorrect test in considering whether the applicant was the spouse of her sponsor at the time of the application within the meaning of cl 820.211(2) of the Migration Regulations.

Particulars

- a. The proper test under cl 820.211(2) relates to whether the applicant and the sponsor met the definition of a married relationship under s5F(2) at the time of the application, namely 28 December 2012.
- b. The Tribunal erroneously focused in its decision on the nature of the relationship from the time that the applicant and the sponsor met in May 2010, before they were married, rather than the time of their application.

- 45 The Tribunal identified that:

70. After considering all of the circumstances of the relationship, and the evidence before it, the Tribunal finds that while the applicant and sponsor were legally married on 9 December 2012 and the applicant applied for the visa on 28 December 2012 they did not at that time demonstrate a mutual commitment to a shared life as husband and wife to the exclusion of all others, nor does the Tribunal accept that the relationship between them at the time of the visa application was genuine and continuing.

46 In support of this ground, the applicant argues that the Tribunal's consideration of the circumstances of the relationship, up until the time of application, demonstrates that the Tribunal failed to have regard to the relationship at the date of application. In *Angkawijaya* at paragraph [64], the Full Court said:

We would make the following comments on this aspect of the primary judge's reasoning:

- (1) in a case such as here where there is a claimed de facto relationship it is, of course, not relevant to assess and determine the presence of a mutual commitment to a shared life **as a husband and wife** to the exclusion of all others and we strongly doubt that the primary judge intended to suggest otherwise; and
- (2) we also doubt that the words which are emphasised in the extracts above were intended by his Honour to suggest that the parties' motivations for entering into a relationship are always irrelevant to the statutory task. Rather, we understand the primary judge to be making the point that the determination of whether or not a decision-maker is satisfied that there is a genuine de facto relationship is one which must be made as at the time of the decision and not by reference to some earlier point in time, such as when the parties embarked upon their relationship. In our view, as long as the relevant time is firmly kept in mind, we see no reason why the decision-maker should not take into account, together with all other relevant circumstances of the relationship, the motivation of one or both of the parties for entering into the relationship. However, as was emphasised by the Full Court in *Dhillon* at [11] per Northrop, Wilcox and French JJ, those motivations may change and the critical issue is whether or not the administrative decision-maker is satisfied that the parties are in a genuine de facto relationship as at the time of the decision. We do not consider that the Tribunal erred in the approach it took to the relevance of what it considered to be Ms Angkawijaya's motivation to remain in Australia. The Tribunal correctly observed in [110] that Ms Angkawijaya's motivation was not "mutually exclusive" to there being a genuine de facto relationship. That statement is not inconsistent with *Dhillon*.

47 The primary difficulty for the applicant is that the history of the relationship is necessarily probative to the findings as to the nature of the relationship at the time of application: see cl.820.211. It is argued that this fails to properly deal with the submission (at CB408-9):

As such, it was not until [Q] reached out to Le when she was detained at the Maribyrroong Immigration Detention Centre that they made a decision to be reunited

once again, [Q] visited her on a weekly basis and their relationship continued where it last left off. It should be noted that during these period Mr [Q] and Mrs Le never stopped thinking about each other.

Since then, the couple has been inseparable and have been living together in Richmond, Victoria. Despite the adverse findings as to the genuineness of their relationship, Quan and Mrs Le have been living together a full-time basis since her release from detention for more than 3½ years and in a long-term partnered relationship for more than 5½ years. It is submitted that based on the circumstances of their long-term relationship, this constitutes a compelling reason to justify a waiver of the Schedule 3 requirements.

48 The argument was developed that the Tribunal's focus on pre-2012 detention was such that the Tribunal did not focus on the marriage relationship at the time of application. However, as Counsel for the Minister points out:

- 37.1. The Tribunal accepted that the parties had married on 9 December 2012. That meant that the relationship satisfied one of the requirements of the definition in section 5F(2)(a) – being the requirement in paragraph (a). The fact that the Tribunal was satisfied that the parties married on this date did not entail that the other requirements for the parties to be in a “*married relationship*” as defined in the Act (including that the Tribunal was satisfied that the parties had a “*mutual commitment to a shared life as husband and wife to the exclusion of all others*”, a “*genuine and continuing relationship*” etc) were satisfied. Whether those other requirements were satisfied was a matter for evaluation by the Tribunal.
- 37.2. The Tribunal also accepted that the parties commenced cohabitation on 21 December 2012 (one week before the visa application). But whether that cohabitation for a short period before the visa application was sufficient (together with all of the other relevant evidence) to persuade the Tribunal that the relationship satisfied all of the requirements of a “*married relationship*” was for the Tribunal to consider. This Court cannot decide that the “*nature of the relationship*” (i.e. its quality as relevant to whether the requirements of section 5F were satisfied) “*changed*” in December 2012.

49 In substance, this ground effectively seeks merits review of the decision of the Tribunal and must be dismissed.

Ground Four

50 This grounds provides that:

4. The Tribunal failed to conduct its statutory task of review in determining whether the requirements of cl 820.221 were satisfied at the time of the decision.

Particulars

- a. The Tribunal found at [85] that the requirements of cl 820.221 were not met at the time of the decision, based only on the Tribunal's view that cl 820.211(2) was not time of the application.

- b. The Tribunal failed to consider the nature of the relationship between the applicant and the sponsor as at the date of the Tribunal's decision, namely 25 October 2016, as opposed to the period between 2010 and the application in December 2012.

51 The substance of this ground is that the Tribunal's determination as to the nature of the relationship at the time of the decision was based entirely on the determination of the nature of the relationship at the time of application. The Tribunal noted the evidence that the applicant had lived with the sponsor since the application was lodged. It was a lengthy period of around 4 years. The Tribunal only discussed this briefly, saying:

84. The Tribunal has considered the parties' claim that they have been living together for more than three and a half years since the applicant was released from detention and that during that period she has cared for the visa applicant. The Tribunal has taken into account the findings of the Court in *Bretag v RRT* (1991) FCA 582 which is authority for the proposition that the Tribunal may take into account circumstances that occur after the time of application in assessing the circumstances that existed at that earlier time point in time. The Tribunal has considered whether the events subsequent to the time of the visa application tend logically to show that the parties were in a spousal relationship at the time of the visa application. However based on the evidence before it considered as a whole, and in light of the Tribunal's concerns about the credibility of the visa applicant, the Tribunal does not accept that the parties' circumstances since the time of the visa application indicate that they were in a genuine spousal relationship at the time of application in December 2012.

85. Based on the evidence considered as a whole and in consideration of the factors set out in r.1.15A the Tribunal is not satisfied that at the time the visa application was made the parties had a mutual commitment to a shared life as husband and wife to the exclusion of all others or that the relationship between them was genuine and continuing. The Tribunal is therefore not satisfied that they were in a spousal relationship as defined by s.5F, and therefore the applicant does not meet the requirements of cl.820.211(2) at the time of application and cl.820.221 at the time of decision.

52 As Counsel for the Minister points out, cl.820.221 of the Regulations requires the applicant to continue to meet the time of application requirements with respect to the nature of the relationship. Thus, if the applicant has not met the requirement at the time of application, they cannot logically have continued to meet the requirement from the time of application to the time of decision, even if in the intervening period the relationship developed into a relationship sufficient to satisfy the visa requirements.

53 The applicant develops this argument by saying that the Tribunal Member should have had regard to the nature of the relationship at the time of decision, as one of the facts and circumstances relevant to determining the nature of the relationship at the time of application.

54 I do not accept that the Tribunal Member was required to determine whether or not the relationship met the criteria at the time of decision. However, I do accept that the way in which the relationship developed from the time of application to the time of decision may have been relevant to determining the nature of the relationship at the time of application. The question is then whether the Tribunal considered the relevant facts and circumstances that reflect the events since the time of application.

55 In the decision, the Tribunal Member notes a variety of facts and circumstances that occurred after the time of the application, saying, for example:

17. The applicant's submission is that the couple always intended to live together once they were married, and have maintained throughout the visa application process that they were in a de facto relationship despite their then living arrangements. She has submitted that they maintained separate living arrangements until she was released from Maribyrnong Immigration Detention Centre after the couple married, and after which she started living the sponsor on a full-time basis as she was already married to him by then.

...

21. The Tribunal asked the applicant for how long she was detained after her arrest and she stated that she was in detention for seven months and thirteen days. The Tribunal asked her when she had applied for the visa the subject of the present review, and she stated that she thinks it was in 2012, as her then representative was the one who lodged the application. She then stated that she had married the sponsor on 9 December 2012 and, after being released from detention on 20 December 2012, she went to live with the sponsor and applied for the visa on 28 December 2012. The Tribunal asked her why she and the sponsor had married while she was in detention rather than waiting until she was released. The applicant responded that her representative had advised her to marry while she was still in detention, and also because her fiancé had been waiting too long.

...

37. The Tribunal asked the applicant how the sponsor had reacted to her being arrested and sent to jail. The applicant told the Tribunal that he did not know that this had happened and she didn't want him to know. She said it was only after she was advised by her friend Ms Bui that her sponsor had been trying to find out where she was that she decided to ring him so that he wouldn't go mad. The Tribunal told the applicant that it found it difficult to understand why she would have not have told her sponsor that she had been detained in light of her evidence that they had been in a long standing de facto relationship at the time. The applicant said that she had felt ashamed. The Tribunal asked her whether, during the period of detention she had been resigned to never seeing the sponsor again. She responded that she didn't think anything, but just spent her time in prayer. She then signed her papers to "go home" prior to getting in contact with the sponsor.

...

63. According to the applicant's submission it was not until the sponsor contacted

her at Maribyrnong Immigration Detention where she had been transferred at the conclusion of her sentence that they decided to be reunited. The sponsor then visited her on a weekly basis and the relationship continued. Since her release from detention the couple has lived together in Richmond. According to the applicant's submission, despite the adverse findings as to the genuineness of their relationship, the parties have been living together for more than three and a half years since the applicant was released from detention and have been in a long term relationship for more than five and a half years. She considers that this constitutes a compelling reason for the waiver of the Schedule 3 requirements in the case.

...

74. There is minimal evidence before the Tribunal regarding the financial aspects of the parties' relationship or the nature of any household they shared at the time of the visa application. The Tribunal gives significant weight to the inconsistencies in the parties' evidence about whether or not the visa applicant met and acknowledged the sponsor's daughter when the sponsor and his daughter lived together in Richmond and when the parties claim to have been in a de facto relationship prior to their marriage. The Tribunal has considered the applicant's suggestion that this inconsistency can be explained by the difference between the term 'child' and the term 'daughter' but does not accept that this is plausible. Even if the evidence in this respect was not inconsistent the Tribunal considers that had the applicant been living with the sponsor for two or three days a week at a home he shared with his daughter, she would have been able to tell the Tribunal something about the applicant's daughter.

56 It is clear that the Tribunal did not consider the relationship at the time of application in isolation from the events that followed. It is not necessary for the Tribunal to make a specific finding as to whether the relationship would meet the legal definition as at the time of decision, only that it take into account the relevant facts and circumstances. As a result, I am not persuaded that the Tribunal erred, and therefore I dismiss this ground.

Ground Five

57 This ground is set out as follows:

5. The decision of the Tribunal was affected by a reasonable apprehension of bias, or alternatively, the Tribunal made a jurisdictional error by taking into account irrelevant considerations.

Particulars

- a. The Tribunal had before it information relating to the applicant having been charged, remanded and convicted for cultivating cannabis (the 'Information').
- b. The Information was not relevant to the criteria that the Tribunal was required to determine and was not otherwise relevant to the review, save to establish the chronology and to explain the relationship between the applicant and her husband during the period she was detained on remand.

- c. The Tribunal questioned the applicant at length regarding the circumstances of the alleged offending.
- d. The Tribunal found that the Information was relevant to question of the applicant's credibility.
- e. A reasonable observer may apprehend that the Tribunal may have been influenced by the Information, consciously or subconsciously.
- f. Further and alternatively, the Tribunal erred in taking into account irrelevant considerations, namely the Information, in assessing the applicant's credibility.

58 In this matter, the Tribunal had information about the applicant's conviction for cultivation of cannabis and subsequent imprisonment. The applicant also confronts the difficulty that this material is a necessary part of the narrative of the relationship. The relevance of this to the nature of the cohabitation is obvious: the applicant and sponsor could not live together whilst the applicant was incarcerated. Further, the material was contained in and referred to by the applicant in her own submissions to the Tribunal.

59 The applicant points to the discussion by the Tribunal at paragraphs [19] to [20] of the decision:

- 19. The Tribunal noted that the applicant had been arrested and charged with cultivating cannabis, and subsequently jailed in March 2012, and asked her to describe what had happened. The applicant stated that she had been working on a farm in Lilydale and had wanted to move closer to Melbourne. She was offered free accommodation in a house in St Albans and had been staying in the house for three weeks before her arrest and didn't know that cannabis was being cultivated there. She told the Tribunal that she had nothing to do with cultivating the cannabis because her room was separate from the main part of the house, and she would rise early in the morning to go to work each day and not come home until about 7 o'clock at night. In response to the Tribunal's questions she stated that actually her room was in the main part of the house, and the police charged her because she was there when they came, and she was convicted of the crime. She told the Tribunal that on the day of her arrest she had left the house in the morning and didn't see anything in her room, but when the police came there was some "equipment" in her room. She said there were no seedlings or plants in her room but just little pots for propagation, which she thinks were put in her room by others.
- 20. The Tribunal noted that her evidence about this event was inconsistent with her earlier submissions which indicated that twenty cannabis seedlings had been placed in her room. The applicant insisted that this was not the case and there were no plants found in her room. At the request of the applicant's representative the Tribunal identified and read out the passage in the applicant's submission dated 7 April 2015 which states 'The police found 20 marijuana plant seedlings in her bedroom that had been moved there during the day without her knowledge or consent.' The applicant then agreed that there had been marijuana plants in her room when she was arrested.

- 60 The test for apprehended bias is whether ‘a fair-minded lay observer might reasonably apprehend that the [decision maker] might not bring an impartial mind to the resolution of the question the [decision maker] is required to decide’: see *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 (*‘Ebner’*) at paragraph [6] and *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50 (*‘CNY17’*).
- 61 Once it is accepted that the material was relevant to the decision that the Tribunal had to make, and had been placed before the Tribunal by the applicant, the argument collapses somewhat, as it cannot be based simply on the Tribunal Member becoming aware of the material, but instead must focus upon how the Tribunal Member dealt with the material and whether the member approached the task with a mind open to persuasion: see *Minister for Immigration and Multicultural and Multicultural Affairs v Jia Legeng* [2001] HCA 17 at paragraphs [69], [71]-[72] and [127]. Importantly, in this case the charges were not for offences of dishonesty (see generally the discussion in *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17), nor even offences for which there is an identifiable victim who was directly harmed by the applicant.
- 62 The applicant points to the questions of the Tribunal Member in the hearing (at T5 to T8) where the Tribunal Member questioned the applicant about the circumstances that led to the charges, and ultimately her conviction and incarceration, such as:

MEMBER: Then you remained unlawful until you arrested and charged with cultivating cannabis in March 2012. Is that right?

MS LE: That's correct, madam.

MEMBER: Tell me about that. Why were you cultivating cannabis?

MS LE: At that time I was working in the farm at Lilydale and then we know Mr - and then I - that's why I wanted to move closer to Melbourne and one person offer me free accommodation and so I come to stay there. I wasn't aware what was happening in that house. I was in that house only three weeks and then I was arrested.

MEMBER: So you're telling me you weren't cultivating marijuana?

(indistinct) short statement (indistinct) interpreter (indistinct).

MS LE: I haven't had anything to do with cultivating because the place where I was sleeping a bit apart from the - even the house, we live apart from the house where they cultivating marijuana.

- 63 However, I note that the Tribunal Member was also clear about the purpose of the questions, saying during the interview (at the last paragraph on T7), in response to the question of relevance:

MEMBER: Part of my role is to test the credibility - of itself it may not be significant but (indistinct) say it's irrelevant. Yes, in this lady's submissions to the previous tribunal dated 7 April 2015 (indistinct) the paragraph numbered on the second page of that submission it states, "The police found 20 marijuana plant seedlings in her bedroom that were moved there without her knowledge or consent." She's pleaded guilty and was sentenced (indistinct).

64 Ultimately, the applicant gave evidence before the Tribunal Member about these events that went to her credibility. It does not appear that the Tribunal Member was drawing an adverse inference against the applicant because she had grown some marijuana plants, but rather, because of the unreliable evidence that she gave.

65 It will always be difficult for decision makers in cases involving applicants with criminal convictions, which must be disclosed as part of the narrative of events relevant to the decision. This, of itself cannot give rise to a claim of apprehended bias, particularly in the context of decisions by professional decision makers. How the decision maker approaches the case or frames their decision may provide evidence that would satisfy the test in *Ebner* and *CNY17* in individual cases. This is not a case where the Tribunal Member sought expressions of remorse or repentance from the applicant, nor expressed views that the offence was serious or abhorrent. I am not persuaded that a fair-minded observer would 'reasonably apprehend that the [decision maker] might not bring an impartial mind to the resolution of the question', simply because the circumstances of the offending or arrest where the subject of questions, in the same way that a version of events which did not involve the police may be the subject of careful questioning as part of the process for determining credibility.

66 I therefore find that the applicant has not established this ground for review.

CONCLUSION

67 As the applicant has not established a ground for judicial review the application must be dismissed.

68 I therefore make orders accordingly.

I certify that the preceding sixty-eight (68) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Riethmuller.

Associate:

Dated: 28 June 2021